IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IBJ WHITEHALL BANK & TRUST CO., Plaintiff, v. CORY & ASSOCIATES, INC., Defendant/Third-Party Plaintiff, v. INSURANCE BROKERS SERVICE, INC. AND TRAVELERS INDEMNITY COMPANY, Third-Party Defendants.	)	CIVIL ACTION No. 97 C 5827 Judge Plunkett Magistrate Judge Schenkier

MEMORANDUM OPINION AND ORDER

Plaintiff IBJ Whitehall Bank & Trust Company ("Whitehall") brought this action alleging, *inter alia*, negligent misrepresentation against defendant Cory & Associates ("Cory"), an insurance broker. This suit stems from a loan made to Caribbean Communications Corporation ("CCC") by Bank of Nova Scotia ("BNS") and Whitehall the (collectively, "the Banks"). According to the complaint, one of the conditions precedent to the loan required that CCC show adequate proof of insurance, which it acquired from Cory. After CCC's facilities were destroyed by Hurricane Marilyn, the banks allegedly learned that CCC's business interruption insurance was less than Cory had told both CCC and the Banks. Unable to fund the reconstruction of its facilities (due to insufficient insurance coverage), CCC eventually filed for bankruptcy protection and assigned its right to sue Cory to Whitehall. Whitehall filed suit against Cory, and defendant

Cory subsequently joined Insurance Brokers Service and Travelers Indemnity Company ("Travelers") as third-party defendants.

Third-party defendant Travelers now seeks a motion to compel production of certain documents from Whitehall, for which Whitehall has asserted privilege (Privilege Log Docs. 1-3, 6-8, 10, 12-13, 16-18, 19, 22, 24-26, 28-29, 31-34, 36, 39, 41-42, 45, 47, 48-49, 52 and 54-56, as numbered in Christmas Dec. in Opp'n. to Mot. to Compel, Ex. 2, hereinafter "Christmas Dec."). Travelers argues that (1) the challenged documents are neither attorney-client communications nor work product; (2) the joint defense privilege is inapplicable, because the documents are not privileged in the first place; and (3) even if the documents were otherwise privileged, the joint-defense privilege is inapplicable because the communications were between non-lawyers and any privilege has therefore been waived (Third Party Def.'s Mot. Compel at 3-4).

The motion was referred to this Court by an Order dated June 24, 1999. The motion has been fully briefed, and the documents that are the subject of the motion have been submitted for an *in camera* inspection. For the reasons set forth below, upon consideration of the arguments raised and the court's *in camera* review, Traveler's motion is granted in part and denied in part.

I.

At the threshold, we set forth the principles of attorney-client privilege and work product doctrine that govern the Court's consideration of the motion.

A.

Though largely at odds with liberal federal discovery standards, the attorney-client privilege serves the important policy of fostering "full and frank communication between attorneys and their clients and

thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also, United States v. Frederick*, ___ F.3d ___, ___, 1999 WL 436158, at *2 (7th Cir.) ("The attorney-client privilege is intended to encourage people who find themselves involved in actual or potential legal disputes to be candid with any lawyer they retain to advise them"). The Seventh Circuit long ago set forth the elements of the privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983); *see also, Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 319 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

The party asserting the attorney-client privilege has the burden of establishing each of those elements on a document-by-document basis. *Lawless*, 709 F.2d at 487. Furthermore, the scope of the privilege is to be "strictly confined within the narrowest possible limits." *Id. (quoting* 8 Wigmore, Evidence § 2291 (McNaughton rev. 1961)). The Seventh Circuit has explained the rationale for this approach: "When the privilege shelters important knowledge, accuracy declines. Litigants may use secrecy to cover up machinations, to get around the law instead of complying with it. Secrecy is useful to the extent it facilitates the candor necessary to obtain legal advice. The privilege extends no further." *In re Matter of Michael Feldberg*, 862 F.2d 622, 627 (7th Cir. 1988).

Consistent with these principles, courts in this jurisdiction have held that not all communications from a client to his attorney are privileged. Rather, "the privilege 'protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.'" *In re Matter of Carl Walsh*, 623 F.2d 489, 494 (7th Cir. 1980) (*quoting Fisher v. United States*, 425 U.S. 391, 403

(1976)). Documents prepared for both legal and non-legal review are not privileged. *Frederick*, 1999 WL 436158, at *4 ("a dual-purpose document – a document prepared for use in preparing tax returns *and* for use in litigation – is not privileged") (emphasis original); *see also, In Re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 518 (N.D. Ill. 1990). And, documents that are routed to an attorney as a matter of routine, or merely for the purpose of asserting a privilege, are not privileged. *Matter of Feldberg*, 862 F.2d at 627.

Nor are communications from the attorney to the client automatically privileged. Although some courts have broadly extended privilege to such communications, *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 144-45 (D. Del. 1977), many other courts – including courts in this jurisdiction – have declined to do so. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 28 (N.D. Ill. 1980). As recognized in *Ohio-Sealy*:

> The basis of the privilege is the policy of promoting the free flow of communication between a client and his attorney . . . However, the court in *Radiant Burners* warned that since the privilege is an obstruction to full and free discovery, "it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 320 F.2d at 323. A rule conferring privileged status upon a broad range of communications from the attorney to the client would ignore *Radiant Burners'* caveat.

Id. The court finds this reasoning persuasive. Thus, we adopt the rule that communications from the attorney to the client are privileged only (1) "if it is shown that the client had a reasonable expectation in the confidentiality of the statement; or, put another way, if the statement reflects a client communication that was 'necessary to obtain informed legal advice (and) which might not have been made absent the privilege.'" *Ohio-Sealy*, 90 F.R.D. at 28 (*quoting Matter of Walsh*, 623 F.2d at 494); or (2) if the communications "tend to directly or indirectly reveal a client confidence." *Harper-Wyman Co. v.*

Connecticut General Life Insurance Co., 1991 WL 62510, at *3 (N.D. Ill.) (*citing United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990)).

Like other privileges, the attorney-client privilege may be waived: for example, the attorney-client privilege is generally waived when documents are disclosed to third parties. *Sioux City,* 133 F.R.D. at 518. However, while disclosure to a third party typically waives the privilege, that is not the case where the parties are linked by a common interest:

> Where two or more persons jointly consult an attorney concerning a mutual concern, "their confidential communications with the attorney, although known to each other, will of course be privileged in a controversy of either or both of the clients with the outside world." *C. McCormick, Law of Evidence*, § 95 at 192 (1954 ed.); *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979), *Matter of Grand Jury Subpoena*, 406 F. Supp. 381, 387-389 (S.D.N.Y. 1975). Moreover, the joint defense privilege cannot be waived without the consent of all parties to the defense, except in the situation where one of the joint defendants becomes an adverse party in a litigation. *Grand Jury Subpoena, id*. at 393-394.

Sealy, 90 F.R.D. at 29.[1]

B.

The work product doctrine, like the attorney-client privilege, protects documents from otherwise liberal discovery rules. The doctrine protects "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3). A fundamental purpose of work product protection is to "avoid deterring a lawyer's committing his thoughts

[1] While commonly called the "joint defense privilege," that label is something of a misnomer. The rule can apply to any two parties who have a "common interest" in current or potential litigation, either as actual or potential plaintiffs or defendants. *Russell v. General Elec. Co*., 149 F.R.D. 578, 580 (N.D. Ill. 1993); *see also, United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997) (*quoting United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989) (noting that the "joint-defense privilege" is more properly labeled a "common interest rule").

to paper." *Frederick*, 1999 WL 436158, at *2. To serve that end, the protection provided by the work product doctrine is "distinct from and broader than the attorney-client privilege." *Dawson v. New York Life Ins. Co.*, 901 F. Supp. 1362, 1368 (N.D. Ill. 1995) (*quoting United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975)); *see also*, Wright, Miller, Marcus, Federal Practice and Procedure Civil: Vol. 8, § 2026 at 400-401 (1994 ed.).

But, unlike the attorney-client privilege, protection under the work product doctrine is not absolute. Rather, documents that are privileged under the work product doctrine still must be produced if the requesting party "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). The only documents that may receive absolute protection under the work product doctrine are those that would disclose "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). *See also*, *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

As is true with the attorney-client privilege, the privilege granted under the work product doctrine may also be waived if the documents are disclosed to a third party. *Sioux City*, 133 F.R.D. at 518. However, as with the attorney-client privilege, work product may be created or shared with another party that has a "common interest" without a waiver of the protection. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 939 (8th Cir. 1997); *Haines v. Liggett Group*, 975 F.2d 81 (3rd Cir. 1992).

II.

In response to discovery requests Whitehall produced approximately 20 banker's boxes of materials, along with a 69-page privilege log pursuant to Traveler's request (Mot. to Compel at 1). Travelers challenges Whitehall's assertion of privilege with respect to 33 of the documents listed in the

privilege log.[2] The documents can be grouped into three categories: (1) ordinary business communications between the Bank of Nova Scotia and IBJ Whitehall (then IBJ Schroeder) concerning the default of CCC and business strategies for resolving the current default situation;

(2) communications that, in part, seek or refer to legal advice; and (3) communications that seek or refer to legal advice in their entirety. We address each of those categories in turn.

A. <u>Ordinary Communications Regarding the Default of CCC</u>.

The majority of the documents in this first category can be characterized as ordinary business communications between Whitehall and BNS (Privilege Log Docs. 1-3, 6-7, 10, 12-13, 19, 24, 28, 31, 39, 45, 47, 48-49, 52), which discuss various strategies for handling the default situation with CCC.

Those documents are not subject to the attorney-client privilege because none of the communications seek legal advice or are directed to an attorney for the purpose of seeking legal advice. The fact that one of the documents (Privilege Log Doc. 1) was carbon-copied to an attorney does not render it privileged. "[I]f an attorney is simply a 'mail drop' for the purposes of trying to create a screen against discovery, . . . the fact that a document is sent through an attorney cannot prevent its having to be produced." *Sioux City*, 133 F.R.D. at 520.

Nor are these documents work product. It is well settled that work product only applies to documents prepared "in anticipation of litigation or for trial." *Sioux City*, 133 F.R.D. at 519. Although we agree that bankruptcy litigation likely was imminent at the time the documents were produced (Pl.'s Mem. Opp'n. Mot. Compel at 4), the fact that a lawsuit is imminent does not automatically make all

[2] Travelers' motion actually challenges 57 separate documents, but several are duplicates of each other (Pl.'s Mem. Opp'n. Mot. Compel at 3 n.1). This Court reviews the 33 documents that are not duplicates.

documents generated by a party (or parties) work product. "Communications from a client that neither reflect the lawyer's thinking nor are made for the purpose of eliciting the lawyer's professional advice or other legal assistance are not privileged." *Frederick*, 1999 WL 436158 at *2; *see also*, *Sioux City*, 133 F.R.D. at 520 (rejecting view that litigation renders all non-attorney memoranda work product "simply because the ultimate findings of the employees will be conveyed to the attorneys who are in charge of the litigation"). Rather, documents are work product ""[o]nly where the document is primarily concerned with legal assistance." *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981).

Based on its inspection of these documents, the Court concludes they were prepared by the parties at their own initiative, so that they might communicate and develop a business strategy for handling CCC's default. Whitehall has not offered any affidavits or other evidence to the contrary, relying on the privilege log to establish its burden of proof. The log fails to satisfy Whitehall's burden with respect to these documents.

Plaintiff argues that the documents should be protected because they all concern "strategic maters in which the parties were in the process of seeking, or had obtained, legal advice," and "concern as well anticipated and actual litigation" (Pl.'s Mem. Opp'n. Mot. to Compel at 2-3). The Court agrees that many of these documents reflect strategic matters; but they concern strategic *business* matters, and not strategic *legal* matters. At bottom, then, what plaintiff really asserts is that because the documents were created at a time when litigation was in the air and one possible option, they must automatically be deemed privileged. The Court must reject such a broad view of the privilege, which is at odds with governing authority requiring that the privilege be more "strictly confined." *Lawless*, 709 F.2d at 487. Moreover, since the documents do not contain privileged information, the fact that they passed between non-lawyer

representatives of parties with a joint interest is not sufficient to create a privilege. Accordingly, the documents identified as Privilege Log Document Numbers 1-3, 6-7, 10, 12-13, 19, 24, 28, 31, 39, 45, 47, 48-49 and 52 must be produced in their entirety.

B. Documents Which In Part Reference Legal Advice.

Several of the documents in issue, although similar in substance to those documents just discussed, also contain references to counsel or advice from counsel (Privilege Log Docs. 8, 16, 18, 22, 29, 32, 34, 36, 41-42, 56). This set of documents consists almost entirely of communications between non-attorneys from IBJ and BNS. Travelers does not dispute the existence of a "common interest" between the Banks, which would be sufficient to create a joint privilege. Rather, Travelers argues that the joint privilege only applies to documents disclosed *to* or *by* attorneys. Thus, Travelers reasons that since these documents are communications between non-attorneys, they are not privileged. Whitehall disagrees, arguing that ""[the] question in determining whether a document is part of the joint defense effort is not the party to whom the document was directed, but whether the document reflects material [that] is part of the joint-defense effort." *Ohio-Sealy*, 90 F.R.D. at 29.

The joint defense privilege "has been recognized in cases spanning more than a century." *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979). The purpose of the privilege is to foster communication between parties engaged in a joint defense. *Id*. The privilege clearly can protect communications from one party to another party's lawyer, communications between the parties' respective lawyers, and communications from one party's lawyer to the other parties. *Id*. Furthermore, the privilege can protect communications from one party to an agent of another party's attorney, as long as the agent is seeking the information on behalf of the attorney. *Id*. However, the Seventh Circuit has not yet ruled

on whether the joint defense privilege covers communications between two non-lawyer from parties who have a common interest. At least one district court in this jurisdiction has ruled that it does not. *Schachar v. American Academy of Opthalmology, Inc.*, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (holding that an attorney must be party to the communications in order for the privilege to attach); *see also, John Labatt Ltd. v. Molson Breweries*, 898 F. Supp. 471, 476-77 (E.D. Mich. 1995) (holding that communications only privileged if the party receiving privileged information is a "conduit" to other attorneys).[3]

However, the Court does not find persuasive the holding in *Schachar*, which was set forth without explanation. To the contrary, the Court believes that the kind of bright-line rule set forth in *Schachar* is at odds with the well-settled rule that in a single-party setting attorney-client privilege or work product may exist for communications between non-lawyers. For example, the attorney-client privilege is preserved if statements are made to an attorney's agent rather than to the attorney. *McPartlin*, 595 F.3d at 1336. Work product may also remain protected, even if it is never disclosed to an attorney. "Since Rule 26 clearly protects party, and not just attorney, preparation, the fact that a particular communication may not go to an attorney does not prevent its being work product." *Sioux City*, 133 F.R.D at 520.

There is little question as to how these principles apply in a single-party context. For example, a communication between employees may be subject to the attorney-client privilege if one of the employees (a supervisor, for example) is seeking information from another employee on behalf of counsel. *McPartlin*,

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[3] In *Harper-Wyman*, the court – citing *Schachar* – found assertion of the joint privilege for communications between non-attorneys "problematical" where the scope of the group receiving the communications (a large number of trade association members) was undefined. 1991 WL 62510, at *6. In this case, the scope of the group which asserts a common interest (IBJ and BNS) is narrow, well defined and, indeed, there is no dispute that they in fact possessed a common interest.

595 F.3d at 1336. Likewise, non-lawyer employees may exchange or collaborate on work product without waiving the work product privilege, so long as the work product will eventually assist in litigation. *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 152 F.R.D. 132, 136 (N.D. Ill. 1993). Thus, in the single-party context, it is the nature of the communication, rather than who the communication is addressed to, that determines whether or not it is privileged. *Ohio-Sealy*, 90 F.R.D. at 29.

This Court sees no reason why that same principle should not be applied to the multiple-parties "common interest" context. Although *Ohio-Sealy* did not address the joint-defense privilege issue presented here (*i.e.*, whether a communication between non-lawyers of two parties with a common interest could fall within the privilege), we believe that the general principle set forth in *Sealy* sheds light on the proper conclusion here. Accordingly, a communication between two parties, each having a common interest in litigation, may be privileged if (1) one party is seeking confidential information from the other on behalf of an attorney; (2) one party is relaying confidential information to the other on behalf of an attorney; and (3) the parties are communicating work product that is related to the litigation.

With these guidelines in mind, we turn to the documents at issue. Portions of these documents simply repeat to one party advice given by the other party's attorney concerning a matter within the parties' common interest. Such advice is clearly attorney work product, and the privilege is not waived simply because one party shared this advice with another party in the context of determining a legal course of action. So long as the parties keep the advice within their circle of common interest, the privilege is not waived.

Other portions of these documents reveal one party seeking legal advice from the other party's attorney by suggesting that the other party consult their attorney about certain issues. Such statements are

privileged attorney-client communications because they disclose confidential information for the purpose of seeking legal advice. The parties are merely relaying (as "conduits") information on behalf of their attorneys.[4] Because the parties have a common interest in the pending litigation, privileges associated with the statements are not waived. Any statements so privileged may be redacted.

However, the Court finds that the plaintiff has failed to establish that the majority of the communications in the documents are attorney-client or work product information. Thus, the documents must be produced, subject to the redactions described below:

> **Document 8:** Whitehall asserts attorney-client and joint defense privileges for this document, which consists of a two-page facsimile from Harvey Siegel, Vice President of Whitehall, to H.W. Kent, Commercial Banking Manager for BNS. The document is a written confirmation of topics discussed in a previous phone call between Messrs. Siegel and Kent. The Court finds that paragraph (b) of this document is work product,[5] as it reflects the advice of an attorney, and attorney-client privileged, insofar as it seeks advice from another attorney. Disclosure of this information between Whitehall and BNS does not waive any privilege. Paragraph (b) thus may be redacted. The remainder of the document discusses general business dealings and must be produced.
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> **Document 16:** Whitehall asserts attorney-client and joint defense privileges for this document from Mr. Siegel to Mr. Kent. The Court finds that the fifth paragraph reveals privileged communications between Mr. Siegel and an attorney, and is subject to the attorney-client privilege. Consistent with the principles discussed above, disclosure of this advice to Mr. Kent does not waive the privilege. Thus, the fifth paragraph may be redacted. The remainder of the document must be produced.

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[4] An inspection of the documents makes it clear that the parties (and not the attorneys) were active, and indeed central, "decision-makers" for BNS and Whitehall. Thus, it seems burdensome to require that the "decision-makers" within the common interest cannot communicate with each other regarding legal advice they received from their attorneys, but must funnel those communications through the attorneys. To the extent there is concern that this will lead to an improper broadening of attorney-client and work product privilege, we believe that extravagant privilege claims will be held in check by the practical fact that privilege assertions for communications that do not involve counsel as an author or recipient are more likely to be challenged and thus more likely to be subjected to an *in camera* review, in which the proponent of the privilege will have the burden of establishing its existence.

[5] Plaintiff does not assert the work product privilege for this document. Plaintiff has, however, met its burden of proof by submitting the documents for an *in camera* review. While some courts may be inclined to reject any privilege that plaintiff fails to assert, we decline to do so here. *See Scurto v. Commonwealth Edison Co.*, 1999 WL 35311, at *3 n.2.

Document 18: Whitehall asserts attorney-client and joint defense privileges for this document from Mr. Siegel to Mr. Kent. The second to last paragraph on page 2 of the document references a privileged communication with an attorney and may be redacted. The remainder of the document must be produced.

Document 22: Whitehall asserts attorney-client and joint defense privileges for this facsimile from Mr. Siegel to Mr. Kent, attaching a draft letter to CCC. The cover facsimile states that the draft letter was prepared by Mr. Siegel, not by counsel. However, the second sentence of the facsimile cover sheet reflects communications seeking legal advice and is covered by the attorney-client privilege; it may be redacted. The italicized sentence in the second paragraph of the letter is attorney work product, and may also be redacted. To the extent a final version of the draft was later sent to a third-party, the Court finds that the privilege in the draft document is not waived. *Sioux City*, 133 F.R.D. at 518. The remainder of the document must be produced.

Document 29: Whitehall asserts attorney-client, work product, and joint defense privileges for this facsimile from Mr. Siegel to Ronald Winters, Senior Vice President for Whitehall. This document consists of Mr. Siegel's impression of a court proceeding and information relayed to Mr. Siegel by his attorney. This document is not attorney-client privileged because it does not seek legal advice or reflect communications of information to an attorney. It does reflect information communicated from an attorney to Mr. Siegel, but (as discussed above) such communications are only privileged if they reflect confidential a communication from the client to an attorney. This document is not work product because it is not prepared "in anticipation of litigation." In other words, the document is not primarily concerned with "preparation or strategy, or the appraisal of the strength or weaknesses of [the] case." *Sioux City*, 133 F.R.D. at 520. Insofar as the document discusses a legal strategy, it mentions only that Whitehall plans to file a particular motion, which has long since been filed and is a matter of public record. The entire document must be produced.

Document 32: Whitehall asserts attorney-client, work product, and joint defense privileges for this facsimile from Messrs. Hickman and Cunningham to Mr. Siegel. The facsimile has two parts: a cover sheet with remarks from Messrs. Hickman and Cunningham, and an attached letter to Mr. Siegel from J. Kram of Rifkin & Associates, Inc. (not identified in the privilege log). The entire paragraph preceded by the number "3" on the cover sheet discusses a legal question to be posed to Mr. Siegel's counsel. As this paragraph reflects confidential communications to be passed on to the attorney, the paragraph is covered by the attorney-client privilege and may be redacted. (*Cite*) The attached letter contains handwritten notes which, according to the privilege log, are from Mr. Siegel's counsel. The handwritten notes may be redacted. The remainder of the document must be produced.

Document 34: This document is the same as Doc. 32, without the attached letter. As discussed above, the third paragraph may be redacted. The remainder of the document must be produced.

Document 36: Whitehall asserts the attorney-client and joint defense privileges for this facsimile from Messrs. Hickman and Cunningham to Mr. Siegel. The document details various financial aspects of the rebuild of CCC, and generally is not privileged. However, the paragraph preceded by the number "3" presents a request for legal advice from Mr. Siegel's counsel. This paragraph is attorney-client privileged and may be redacted. The remainder of the document must be produced.

Document 41: Whitehall asserts attorney-client and joint defense privileges for this facsimile from Mr. Hickman to Mr. Siegel. The document discusses BNS's position with regard to various items of a term sheet. The communication generally reflects business, not primarily legal, considerations and thus generally is not privileged. However, the second sentence of the paragraph preceded by the number "6" may be redacted, as it discusses seeking advice from counsel. The remainder of the document must be produced.

Document 42: This document is the same as Doc. 41, with marginalia and an attachment. According to plaintiff (*see* Christmas Dec. in Opp. To Mot. to Compel, Ex. 2, p. 49, Log Entry No. 42), the marginalia consists entirely of handwritten notes by Mr. Siegel. No evidence has been offered that these reflect communications by Mr. Siegel to his counsel; to the contrary, the log does not indicate these notes were sent to counsel. As for the attachment, it contains an irrelevant article on Alzheimer's disease and an advertisement for a cable television operator, and is not privileged. Thus, as with Document Privilege Log No. 41, the second sentence of paragraph 6 may be redacted. The remainder of the document must be produced.

Document 56: Whitehall asserts attorney-client and joint defense privileges for this facsimile from Mr. Siegel to Mr. Hickman. The paragraph preceded by the number "2" reflects attorney work product and may be redacted. The remainder of the document is not privileged and must be produced.

Accordingly, the document marked as Privilege Log Document Number 29 must be produced without redaction; Document Nos. 8, 16, 18, 22, 32, 34, 36, 41, 42 and 56 must be produced with the appropriate sections redacted as described above.

3. <u>Documents Privileged in Their Entirety</u>.

A small number of the documents are so pervasively filled with either privileged or work product material that the entire document is privileged (Privilege Log Docs. 17, 25-26, 33, 54-55). As discussed

above, the privileged nature of these documents is not waived because they were communicated between parties that had a common interest in litigation, even if non-lawyers served as the conduit for these communications. The majority of the information in these documents is attorney work product. Since Travelers has made no showing that they are not "unable without undue hardship unable to obtain the substantial equivalent" of the documents by other means, the documents remain privileged.

> **Document 17:** Whitehall asserts attorney-client and joint defense privileges for this facsimile from Mr. Siegel to Mr. Kent, which attaches a letter from counsel to Mr. Siegel and a draft document prepared by counsel. The draft document does not appear to be protected by the attorney-client privilege, as it does not reflect confidential communications from a client to counsel. But the draft document does fall within the work product privilege, and thus may be withheld.
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> **Document 25:** Whitehall asserts attorney-client, work product, and joint defense privileges for this letter from Mr. Siegel to Mr. Kent, which forwards a copy of a letter from BNS's counsel to Mr. Haines at BNS. The letter is in response to a request for legal advice and reflects facts given by a party to his attorney for the purpose of seeking that advice. The letter is thus privileged. Consistent with the principles discussed above, the fact that the advice was shared with a common-interest party does not waive the privilege. The document may be withheld.
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> **Document 26:** Whitehall asserts attorney-client and joint defense privileges for this facsimile to Mr. Siegel from Messrs. Hickman and Cunningham of BNS. This document communicates legal strategies discussed or to be discussed with attorneys. The Court finds that this document is attorney-client privileged and is within the common interest of IBJ and BNS; the entire document is protected from discovery.
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> **Document 33:** Whitehall asserts attorney-client and joint defense privileges for this facsimile from Mr. Hickman to Mr. Siegel, which encloses a draft document prepared by counsel. The draft document is work product, and an exchange of work product is well within the joint defense privilege. This document may be withheld.
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> **Document 54:** Whitehall asserts attorney-client and joint defense privileges for this facsimile from Mr. Hickman to Mr. Siegel. The cover sheet indicates that the attached draft is a document drafted by attorneys. The cover letter reflects that Mr. Hickman forwarded it to Mr. Siegel for purposes of ensuring the matters set forth were discussed with IBJ's counsel. This Court finds that the document is privileged and hence not discoverable.
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> **Document 55:** Whitehall asserts attorney-client, work product, and joint defense privileges for this facsimile from Mr. Hickman to Mr. Siegel. The document discusses legal issues and

strategies, as communicated to Mr. Hickman by his counsel. It also mentions communications between Hickman and other counsel. Thus, the document is both attorney-client privileged and work product, is within the common interest, and hence not discoverable.

Accordingly, documents identified as Privilege Log Document Numbers 17, 25, 26, 33, 54, and 55 may be withheld.

CONCLUSION

Travelers motion (Doc. # 60) is granted with respect to Privilege Log Docs. 1-3, 6-7, 10, 12-13, 19, 24, 28, 29, 31, 39, 45, 47, 48-49, and 52, which must be produced without redaction; is granted in part as to Privilege Log Docs. 8, 16, 18, 22, 32, 34, 36, 41-42 and 56, which must be produced after IBJ redacts portions of those documents as described above; and is denied with respect to Privilege Log Docs. 17, 25, 26, 33, 54, and 55, which IBJ need not produce. IBJ shall produce the documents required by this Memorandum Opinion and Order by no later than close of business on August 20, 1999.

ENTER:

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SIDNEY I. SCHENKIER
United States Magistrate Judge

Dated: August 10, 1999